CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930 1931

No. 589 36

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS,

vs.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1930

CERTIORARI GRANTED MARCH 3, 1930

(34,720)

(34,720)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1930

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Names and Addresses of Attorneys

For Appellant:

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Assistant United States Attorney,

Federal Building,
Los Angeles, California.

For Appellees:

Dan J. Chapin,

I. W. Hellman Building,

Los Angeles, California.

CITATION

United States of America—ss.

To R. E. GRAHAM and E. E. FOSTER, co-partners, doing business under the firm name and style of MILLIE-FRANCIS OIL COMPANY, a co-partnership, and DAN J. CHAPIN, their Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 1st day of May, A. D. 1929, pursuant to an Order Allowing Appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled

and you are to show cause, if any there be, why the judgment rendered in the said action above mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD J. HENNING, United States District Judge for the Southern District of California, this 2nd day of April, A. D. 1929, and of the Independence of the United States, the one hundred and fifty-third.

"Edward J. Henning,"
U. S. District Judge for the Southern Distrct of California.

(Endorsed): Filed Apr 4 1929 R. S. Zimmerman, Clerk By W. L. Gaines Deputy Clerk. Received copy of this citation on this 4" day of April 1929. Dan J. Chapin.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

COMPLAINT

Action at Law
No. 3009-H

R. E. Graham and E. E. Foster, Co-partners, doing business under the firm name and style of Millie-Francis Oil Company, a co-partnership,

Plaintiffs,

vs.

Rex B. Goodcell, former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Defendant.

Come now the plaintiffs above named and for cause of action against the defendant herein, complain and allege:

I.

That said plaintiffs, R. E. GRAHAM and E. E. FOSTER, now are and at all times herein mentioned were residents of the State of California, and during all such times were engaged in business as co-partners under the firm name and style of MILLIE-FRANCIS OIL COMPANY;

II.

That said defendant, REX B. GOODCELL, at the time the payment hereinafter alleged was made was the duly appointed, qualified, and acting Collector of Inter-

nal Revenue of the United States of America, in and for the Sixth Collection District, and during all such time was acting in his official capacity as such officer;

III.

That the claim involved in this action, exclusive of costs and interest, amounts to the sum of $9,039.40, together with interest thereon from the 3rd day of December, 1924, at the rate of six per centum (6%) per annum, and this Court has jurisdiction of the parties and the subject matter of this action;

IV.

That said plaintiffs, R. E. GRAHAM and E. E. FOSTER, as such co-partners under the firm name and style of MILLIE-FRANCIS OIL COMPANY, a co-partnership, on or before the 15th day of March, 1918, made a return of tax liability to the Collector of Internal Revenue of the United States of America, under and pursuant to the laws of the United States of America, in and for that district in which the city and county of Los Angeles, California, are situated, for the calendar year of 1917, and pursuant to such return paid or discharge the tax liability so determined to be due and owing to the United States of America under its laws for income and excess profit taxes;

V.

That the time within which the said assessment for the said year of 1917 could be made was not extended by mutual agreement or otherwise, nor was the said time

extended by the said Collector or any agency or officer of the United States Government in any manner whatsoever;

VI.

That thereafter and on or about the 19th day of November, 1924, the Commissioner of Internal Revenue of the United States of America made, levied, and assessed additional income and excess-profit taxes upon and against said plaintiffs for the said calendar year of 1917 in the sum of $7,034.71, together with interest thereon in the sum of $2,004.69, amounting in the aggregate to the sum of $9,039.40, and thereafter and upon the 25th day of November, 1924, the said Collector of Internal Revenue made demand upon plaintiffs for the payment thereof and pursuant to such demand in his said official capacity threatened to enforce and compel payment of the same, together with additional penalties, by proceedings of distraint under the laws of the United States of America, as in such case made and provided;

VII.

That said plaintiffs, in order to prevent said proceedings of distraint being instituted and to avoid threatened seizure of the property of plaintiffs in satisfaction and payment of said taxes thereunder and under duress and in fear of the institution of such proceedings, did, under protest pay to said Collector of Internal Revenue the said sum of $9,039.40, making such payment in two instalments, to-wit: the sum of $2,039.40 upon the 29th day of November, 1924, and the sum of $7,000.00 upon the 3rd day of December, 1924;

VIII.

That thereafter and on or about the 25th day of September, 1925, said plaintiffs herein made, served, and filed upon said Collector of Internal Revenue a claim for refund of the said sum of money exacted and paid as aforesaid upon the ground and for the reason that the same was illegally, wrongfully, and erroneously assessed, levied, and collected in that Section 250 (d) of the Revenue Act of the United States of America of 1921 bars the collection of such taxes after the expiration of five years from and after the date upon which such return was filed, and was paid under protest and under threat and fear of the institution of proceedings of distraint, and that thereafter and upon the 13th day of January, 1926, the said claim of plaintiffs herein for said refund was rejected and denied;

IX.

That the said assessment, and the demand of and the collection by said Collector of Internal Revenue of said sum of money as taxes and interest thereon as aforesaid was void and illegal in that under and pursuant to the laws of the United States of America in such case made and provided, the collection by distraint or otherwise of any and all such income and excess profit taxes is barred by Section 250 (d) of the Revenue Act of 1921 of the United States of America after the expiration of five years from and after the date of the filing of the return for said year of 1917, and that the time within which the said taxes exacted as aforesaid could be legally collected by distraint or otherwise expired on or about the 1st day of March, 1923;

X.

That said sum of $9,039.40 has not been paid to said plaintiffs, nor any part thereof, or any interest thereon, and that the said sum, to-wit: $9,039.40, and the whole thereof, together with interest thereon from the 3rd day of December, 1924, at the rate of six per centum (6%) per annum is now wholly due, owing, and unpaid.

Wherefore, plaintiffs pray for judgment against said defendant as follows:

1. For the sum of $9,039.40, together with interest at the rate of six per centum (6%) per annum from the 3rd day of December, 1924, until paid;

2. For plaintiffs' costs and disbursements herein expended;

3. For such other and further relief as to the Court may seem proper.

Carl E. Cameron,
Thomas B. Irvine,
Attorneys for Plaintiffs.

State of California,
County of Los Angeles—ss.

Carl E. Cameron, being first duly sworn, on his oath deposes and says:

That he is one of the attorneys for the above-named plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes the same to be true; that he makes this verification on behalf of said plaintiffs because said plaintiffs are absent from the

County of Los Angeles, State of California, in which county affiant has his office.

Carl E. Cameron.

Subscribed and sworn to before me this 23rd day of December, 1927.

Ruth E. Allen,
Notary Public in and for the County of Los Angeles, State of California.

(Notarial Seal)

(Endorsed): Filed Dec 23 1927 R. S. Zimmerman, Clerk By L. J. Cordes Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

ANSWER.

Comes now the United States of America by Samuel W. McNabb, United States Attorney for the Southern District of California, and E. E. Doherty, Assistant United States Attorney for said District, and in answer to the Complaint on file herein, admits, denies and alleges as follows, to-wit:

I.

Denies that the plaintiffs R. E. Graham and E. E. Foster now are or at the times mentioned in the complaint residents of the State of California; and the defendant further denies that the said defendants were engaged in business as co-partners under the firm name and style of Millie-Francis Oil Company;

II.

Admits the allegations set forth in Paragraph II of the Complaint on file herein;

III.

Denies that the amount of claim involved in this action, exclusive of costs and interest amounts to the sum of Nine Thousand Thirty-nine and 40/100 Dollars ($9,039.40) or any other amount.

IV.

Having no knowledge of the allegations set forth in Paragraph IV of the Complaint on file herein, the defendant therefore denies upon information and belief that the plaintiffs R. E. Graham and E. E. Foster, were copartners under the firm name and style of Millie Francis Oil Company; defendant further denies that on or before the 15th day of March, 1918, the plaintiffs made a return of tax liability to the Collector of Internal Revenue of the United States of America under and pursuant to the laws of the United States of America in and for that district in which the City and County of Los Angeles, California, are situated, for the calendar year 1917, and pursuant to such return paid or discharge the tax liability so determined to be due and owing to the United States of America under its laws for the income and excess profits tax;

V.

Denies that the time within which the said assessment for the said year 1917 could be made was not extended by mutual agreement or otherwise;

VI.

Admits the allegations set forth in Paragraph VI of the Complaint on file herein;

VII.

Admits the allegations set forth in Paragraph VII of the complaint on file herein;

VIII.

Admits that on or about the 25th day of September, 1925, the plaintiffs made, served and filed upon the Collector of Internal Revenue a claim for refund of taxes upon grounds alleged in Paragraph VIII of the complaint on file herein.

IX.

Denies that the assessment, demand and collection by the Collector of Internal Revenue, of the money paid as taxes by the plaintiffs was void or illegal, and the defendant further denies that the collection of such sums alleged to have been paid as taxes in the complaint was barred by the Statute of Limitations of any of the Revenue Acts;

X.

Denies that the defendant is indebted to the plaintiff in the sum of Nine Thousand Thirty-nine and 40/100 Dollars ($9,039.40) or in any other sum whatsoever.

Wherefore, the defendant prays that the plaintiffs take nothing by this action and that costs be awarded the defendant.

Samuel W. McNabb
United States Attorney
Emmett E. Doherty
Assistant United States Attorney
Attorneys for Defendant

DATED: This 13th day of April, 1928.

(Endorsed): Filed Apr 13 1928 R. S. Zimmerman Clerk Edmund L Smith Deputy Clerk.

[Title of Court and Cause.]

No. 3009-H

STIPULATION

STIPULATION OF FACTS.

It is stipulated between Samuel W. McNabb, United States District Attorney, and Assistant United States District Attorney, Emmett E. Doherty, for said Southern District of California, attorneys for the defendant, and Dan J. Chapin, attorney for the plaintiffs:

First: That said plaintiffs, R. E. Graham and E. E. Foster now are and at all times mentioned in their complaint filed in the above entitled action, were residents of the State of California, and during all such times mentioned in said complaint, were engaged in business as co-partners under the firm name and style of Millie-Francis Oil Company:

Second: That Rex B. Goodcell, defendant herein, on November 29, 1924, and December 3, 1924, the dates on which the payments are alleged to have been made in plaintiffs' said complaint, was the Collector of Internal Revenue for the Sixth District of California, and during such time was acting in his official capacity as such officer:

Third: That the plaintiffs, R. E. Graham and E. E. Foster filed their partnership income and partnership excess profits tax returns for the year 1917, on March 22, 1918, and paid the taxes due thereunder:

Fourth: That the Commissioner of Internal Revenue for the United States made an assessment of additional taxes against the plaintiffs herein in the amount of $7034.71 on the January, 1920 List:

Fifth: That plaintiffs herein filed a claim for abatement of the amount of the taxes so assessed and added interest, with the defendant herein, February 11, 1920:

Sixth: That the Commissioner of Internal Revenue rejected said claim on December 27, 1922:

Seventh: That on November 19, 1924, the defendant herein served a Notice and Demand on the plaintiffs for the payment of said additional tax in the amount of $7034.71, together with interest in the sum of $2004.69, demanding from said plaintiffs the total amount of $9039.40, and the said defendant, in his official capacity threatened to enforce and compel payment of the taxes and interest by distraint and sale of plaintiffs' property:

Eighth: That said plaintiffs, to prevent the seizure and sale of their property to satisfy the payment of said tax and interest, did under duress and protest, pay to the defendant, then Collector of Internal Revenue, the said sum of $9039.40, making such payment in two installments, to-wit: the sum of $2039.40, on November 29, 1924, and the sum of $7000.00 on December 3, 1924:

Ninth: That plaintiffs filed with the defendant herein on September 25, 1925, a claim for refund of the said sum of money so exacted and paid by them upon the ground that the amount was illegally, wrongfully and erroneously collected, in that Section 250 (d) of the Revenue Act of the United States of America of 1921 bars the collection

of such taxes after the expiration of five years from and after the date upon which such returns were filed, and wherein payment had been made involuntarily. That said claim so filed was thereafter and upon January 13, 1926 rejected and denied by the Commissioner of Internal Revenue:

Tenth: That at the time the first installment of said taxes was collected by the defendant ($2039.40 on November 29, 1924), six years, eight months, and seven days had elapsed since plaintiffs filed their returns on March 22, 1918, and at the time the second installment was collected ($7000.00 on December 3, 1924), six years, eight months, and eleven days had elapsed since returns were filed by the plaintiffs:

Eleventh: That defendant has not refunded the said amount of $9039.40 or any part thereof to the plaintiffs:

Twelfth: That the plaintiffs at no time entered into any agreement with the Commissioner of Internal Revenue for an extension of the limitations provided by the statutes for the determination of the assessment or collection of the taxes so assessed in the above entitled action:

Thirteenth: That the returns filed on or about the 22nd day of March, 1918, were not false or fraudulent:

Fourteenth: That the five year period for the assessment and collection of the tax, i.e., five years from the date the returns were filed, as provided by Section

250 (d) Act of 1921, had expired long prior to the enactment of the Revenue Act of June 2, 1924.

.....

United States Attorney
Emmett E. Doherty,
Assistant U. S. Attorney
Attorneys for Defendant.
Dan J. Chapin
Attorney for Plaintiff

Dated this 20th day of September, 1928.

(Endorsed): Filed Sep 24 1928 R. S. Zimmerman Clerk By.....Deputy Clerk. Filed Sep 24 1928 R. S. Zimmerman Clerk By Francis E Cross Deputy Clerk.

[Title of Court and Cause.]

No. 3009-H

STIPULATION

It is hereby stipulated by and between plaintiffs and defendant in the above entitled action, through their respective counsel, that a jury trial in the above entitled cause may be and the same is hereby waived.

Dan J. Chapin
Attorneys for Plaintiffs
Samuel W. McNabb,
United States Attorney.
Emmett E. Doherty,
Assistant United States Attorney.

(Endorsed): Filed Jan 3 1929 R. S. Zimmerman Clerk By Frances E Cross Deputy Clerk

[Title of Court and Cause.]

No. 3009-H

FINDINGS AND JUDGMENT

December 28, 1928.

This cause came on to be heard at this time and upon consideration thereof, the Court made findings and judgments as follows:

FINDING OF FACTS

I.

That the only allegations of the complaint considered by the Court were those alleging that the statutes of limitation had run against the collection by distraint or otherwise of the taxes in question.

II.

That there is no issue of fact to be decided as the litigants filed a written stipulation of fact.

III.

That the only question to be decided is whether the statute of limitations had run against the collection of tax in question, and whether the defendant was barred from so collecting the tax and interest on November 29, 1924, in the amount of $2039.40, and on December 3rd, 1924, in the amount of $7000.00, making a total amount of taxes and interest paid on the respective dates of $9,039.40.

IV.

That if the taxes were collectible, the proper amount of tax was assessed and paid. A claim for refund duly made and rejected by the Commissioner of Internal Revenue and plaintiff duly notified.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction of the parties of this suit and of the subject matter thereof.

II.

That the statutes of limitations began to run from the date plaintiffs filed their original return, to-wit: the 22nd day of March, 1918.

III.

That the assessment of $7034.71 was made in the month of November, 1924, to which was added interest in the sum of $2004.69, making a total amount paid of $9039.40; that the time within which said tax and interest might be collected by distraint had expired on March 22, 1923, long before the passage of the revenue Act of June 2, 1924, the collection so made being in no way effected by the extension of time to collect by distraint provided therein, and that on November 29, 1926, and on December 3, 1926, the dates of collection of said tax and interest was so made by warrant of distraint such collection was barred by the statute of limitation.

IV.

That plaintiff is entitled to recovery from the defendant the sum of $9039.40, with interest thereon from the 3rd day of December, 1924, until paid, and

It is hereby ordered that judgment be so entered for the plaintiffs.

DATED: This 23rd day of Jan., 1929.

Edward J. Henning,
United States Distr. Judge.

APPROVED as to form as provided in Rule 44

Emmett E. Doherty,
Attorney for Defendant.

(Endorsed): Filed Jan 3 1929 R S Zimmerman Clerk By Frances E Cross Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

JUDGMENT

The issues in this action having been duly brought to trial before Honorable Edward J. Henning, United States District Judge, on December 28, 1928, and the Court having heard the allegations and proofs of the parties, and after due deliberation having duly made its decision in writing in favor of the plaintiffs and against the defendant, with findings of fact and conclusions of law duly filed in the Clerk's office of said Court.

Now, on said decision it is ordered, adjudged and decreed that plaintiffs R. E. Graham and E. E. Foster,

co-partners doing business under the firm name and style of Millie-Francis Oil Company, a co-partnership, recovers of the defendant, Rex B. Goodcell, former Collector of Internal Revenue for the Sixth District of California, the sum of $9039.40 with interest thereon from the 3rd day of December, 1924.

Judgment signed and entered this 3 day of January, 1929, at.....o'clock.....M.

.....

Clerk.

APPROVED as to form as provided in rule 44.

Emmett E. Doherty,
Attorney for Defendant.

Judgment entered January 3rd 1929 R. S. Zimmerman Clerk By Frances E Cross Deputy Clerk

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At a stated term, to-wit: The July Term, A. D. 1928 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 28th day of December in the year of our Lord one thousand nine hundred and twenty-eight.

Present: The Honorable Edward J. Henning, District Judge.

No. 3009-H Civ.

R. E. Graham, et al., Plaintiffs,

vs.

Rex B. Goodcell, etc., Defendant.

Under date of September 24th, 1928, upon statement made by Emmett E. Doherty, Assistant United States Attorney, counsel for the Government, who filed Stipulation of Facts, the Court having ordered that this cause be submitted on said Stipulation of Facts, and on briefs to be filed 10 X 10 X 5, and the plaintiff having filed its opening brief on October 2nd, 1928, and the Government having filed no brief; and the Court having duly considered the Stipulation of Facts and plaintiff's brief; upon consideration whereof, the Court now orders that judgment be entered for the plaintiff.

[Title of Court and Cause.]

No. 3009-H.

ASSIGNMENT OF ERRORS

Comes now the defendant in the above entitled case and files the following assignment of errors, upon which the defendant will rely in his prosecution of the appeal in the above entitled case from the judgment entered in this cause by this Honorable Court on the 3rd day of January, 1929:

I.

That the United States District Court in and for the Southern District of California, Central Division, erred in ordering judgment for the plaintiff.

II.

That the United States District Court in and for the Southern District of California, Central Division, rendered a judgment contrary to the findings of fact;

III.

That the Court erred in rendering judgment for the plaintiff, as a matter of law.

Wherefore, appellant prays that said judgment be reversed and that said District Court of the United States for the Southern District of California, Central Division, be ordered to enter a judgment reversing the decision in said cause.

Samuel W. McNabb,
United States Attorney.
Emmett E. Doherty,
Emmett E. Doherty,
Asst. U. S. Attorney.

(Endorsed): Filed Apr 2 1929 R S Zimmerman Clerk Edmund L Smith Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

PETITION FOR APPEAL

To the Honorable Judge of the United States District Court for the Southern District of California, Central Division:

The above named defendant and appellant, feeling aggrieved by the judgment rendered and entered in the above entitled cause on the third day of January, 1929, does hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and defendant prays that this appeal be allowed and that citation as provided by law and that a transcript of the

record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court as in such cases made and provided.

And your petitioner further presents that the defendant, Rex B. Goodcell, former Collector of Internal Revenue of the United States, was sued in his official capacity as Collector of Internal Revenue for the United States for the Sixth Collection District of California and that under the existing laws an appeal bond ought not to be required.

Dated: this 2nd day of April, 1929.

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Emmett E. Doherty,
Assistant United States Attorney.

(Endorsed): Filed Apr 2 1929 R. S. Zimmerman Clerk By Edmund L. Smith Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

ORDER ALLOWING APPEAL

Upon reading the petition for appeal of the defendant and appellant, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits.

stipulations and all proceedings be forthwith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

It is further ORDERED that the defendant and appellant be not required to deposit a supersedeas bond pending a determination of the issues involved in this appeal.

Dated: this 2nd day of April, 1929.

Edward J. Henning,
United States District Judge.

(Endorsed): Filed Apr 2 1929 R. S. Zimmerman, Clerk By Edmund L Smith Deputy Clerk

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[Title of Court and Cause.]

No. 3009-H

STIPULATION

It is hereby stipulated by the attorneys for the parties hereto that titles and captions be omitted and designated by lines marked title of court and cause and that the Clerk's filing endorsement only be included in the printed record in this case now on appeal before the United States Circuit Court of Appeals.

Dan J. Chapin,
Attorney for Plaintiffs,

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Emmett E. Doherty,
Assistant United States Attorney.

Dated: this 24th day of May, 1929.
It is So Ordered.
Edward J. Henning,
United States District Judge.

(Endorsed): Filed May 24, 1929 R S Zimmerman Clerk W L Gaines Deputy Clerk

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[Title of Court and Cause.]

CLERK'S OFFICE

No. 3009-H

PRAECIPE

To the Clerk of said Court:
Sir:

Please prepare and certify copy of such papers filed and proceedings had in the above entitled action as are necessary to a determination of the cause on appeal and in particular as follows:

1. Complaint.
2. Answer to Complaint.
3. Stipulation of Facts.
4. Minute Order for Entry of Judgment.
5. Judgment.
6. Stipulation Waiving Jury Trial.
7. Findings of Fact and Conclusions of Law.
8. Assignment of Errors.
9. Petition for Appeal.
10. Order Allowing Appeal.
11. Citation on Appeal.
12. And this Praecipe.

DATED this 14th day of May, 1929.

Samuel W. McNabb,
United States Attorney,

Emmett E. Doherty,
Emmett E. Doherty,
Assistant United States Attorney.

(Endorsed): Filed May 14 1929 R S Zimmerman Clerk By Edmund L Smith Deputy Clerk

CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 24 pages, numbered from 1 to 24, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains full, true and correct copy of:

1. Complaint,
2. Answer to Complaint,
3. Stipulation of Facts,
4. Minute Order for Entry of Judgment,
5. Judgment,
6. Stipulation Waiving Jury Trial,
7. Findings of Fact and Conclusions of Law,
8. Assignment of Errors,
9. Petition for Appeal,
10. Order Allowing Appeal,
11. Citation,
12. Stipulation and Order for Diminution of Record, and
13. Praecipe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this

28th day of May, in the year of our Lord One Thousand nine hundred twenty-nine, and of our Independence the one hundred fifty-third.

(SEAL) R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

No. 5833

United States

Circuit Court of Appeals

For the Ninth Circuit.

R. E. GRAHAM and E. E. FOSTER, Copartners, Doing Business Under the Firm Name and Style of MILLIE-FRANCIS OIL COMPANY, a Co-partnership,

Appellees,

vs.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Appellant.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Alva C. Baird, Special Attorney, Bureau of Internal Revenue, counsel for the appellant, and by Mr. Dan J. Chapin, counsel for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of November, in the year of our Lord one thousand nine hundred and twenty-nine. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich and Curtis D. Wilbur, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

WILBUR, Circuit Judge.—The question involved in this case is the proper interpretation of the word "stay" used in section 614 of the Revenue Act adopted in Congress in 1928 (45 Stat. 875; 26 U. S. C. A., section 2611). The appellees brought an action to recover $9,039.40 taxes they paid under duress to the appellant as Internal Revenue Commissioner on December 3, 1924, for the year 1917, after the five-year period of limitation had run. (26 U. S. C. A. 2607; 45 Stat. 874.) The appellees predicated their right to recover upon sections 3220 and 3226 of the Revised Statutes, and section 250 (d) of the Revenue Act of 1921 (42 Stat. L. 265), as constructed in Bowers vs. N. Y. & Albany Lighterage Co., 47 Sup. Ct. Rep. 389, 273 U. S. 346, and Russell et al. vs. United States, 278 U. S. 181. While the action was pending Congress enacted sections 607 and 611, *supra,* which prohibited a recovery where a claim in abatement had been filed and there had been a stay thereunder. The appellees filed a claim for abatement on February 11, 1920, which was rejected December 27, 1922. Most of the questions involved here were decided by this Court in Huntley vs. Gile, 32 Fed. (2d) 857, but in

that case it was stipulated that there had been a "stay." Here it is contended that the voluntary act of the collector in suspending or delaying the collection after appellee filed its claim for abatement was not a "stay" within the meaning of the statute. The view advanced is that to be a "stay" within the meaning of this statute there must have been a legal inhibition against the collection of the tax, or as it is said, a "legal" stay.

The word "stay," in its varying forms, has numerous definitions, and is applied to somewhat widely differing acts and things, with, however, the general underlying idea of the stoppage or suspension of movement. The following definitions seem pertinent:

Stay (used as a transitive verb, with the preterite and past participle stayed) is in Webster's New International Dictionary (1913) among other things defined as—

> "4. To hold from proceeding; to stop; check; restrain; also, to hinder; delay; detain; postpone; keep back; specif. to stop, or more usually suspend, the progress of by judicial proceedings or executive mandate" * * *

Stay (used as an intransitive verb, in same dictionary):

> "(From stay to hold up; from the idea of standing firm.)
>
> 1. To rest; depend; rely; stand * * *
>
> 2. To cease from any motion or course of action; specif.:

a. To come to an end; to cease; stop; as, that day the storm stayed. archaic.

b. To delay; wait; tarry; linger; as, stay and hear me. * * *

d. To stand still; not to retreat; to remain at a certain point or in a certain state."

In the Standard dictionary (1913), stay, used as a verb, is defined as follows:

"1. To stop the progress of; check; hold back; prevent; not now usually of physical motion; as to stay the ravages of a pestilence or pangs of hunger. * * *

3. To put off until a future time; postpone; hinder; suspend; as, to stay judgment."

The appellee is unable to point out any provision of law which would operate as a compulsory stay in a case where no bond is filed with the claim for abatement, and section 611, *supra*, expressly applies to a "stay" without bond. It is not claimed that any court, state or federal, is authorized to "stay" the collection of the tax. (R. S. 3224, 26 U. S. C. A., section 154.) Even if we were empowered to insert in the statute (section 2611, *supra*) the word "legal" before the word "stay," which we are not authorized to do by construction or otherwise, it would apparently cover a situation that cannot exist, and, therefore, be a useless addition. We see no reason why the word "stay" should not be given its usual significance, which in this case would be delay of executive action. The title of the section under consideration (sec-

tion 2611) can be referred to for the purpose of determining the proper interpretation of the section (Church of the Holy Trinity vs. U. S., 143 U. S. 457, 462). The title of this section is "Collections stayed by claim in abatement." Congress evidently intended to cover cases where actual delay had resulted from the filing of a claim in abatement. The idea of a legal or compulsory or involuntary stay is neither expressed nor implied. The language of the act is as apt to describe a voluntary delay by the collector to enable the claimant in good faith to secure a decision on his claim for abatement before the tax is collected as it is to describe an involuntary delay. The report of the committee of Congress on the bill states this definitely to be the purpose of the proposed enactment. That report is set forth in the opinion in Huntley vs. Gile, *supra*, and need not be repeated here. Our attention has been called to the decision of the Circuit Court of Appeals of the Fifth Circuit in a similar case, United States vs. Burden, Smith & Co., 33 Fed. (2d) 229. For the reasons we have stated we cannot follow that decision.

It is urged by the appellees that the case was not tried below upon the theory that section 2611, *supra*, was involved and that the appellant did not call the attention of the trial court to this section. It is true that the parties cannot change their theory of a case on appeal, but appellant's theory in the court below was that the stipulated facts were legally insufficient to justify a recovery and that is the point presented here. The point was presented in the

court below by motion for a judgment on the admitted facts. The circumstance that the District Court was not called upon to construe section 2611, *supra,* does not prevent a consideration on appeal of the objections and motions made and ruled upon in the trial court.

Judgment reversed.

[Endorsed]: Opinion. Filed Nov. 4, 1929. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5833.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Appellant,

vs.

R. E. GRAHAM and E. E. FOSTER, Copartners, Doing Business Under the Firm Name and Style of MILLIE-FRANCIS OIL COMPANY, a Copartnership,

Appellees.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the judgment of the said District Court in this cause be, and hereby is, reversed.

[Endorsed]: Decree. Filed and entered Nov. 4, 1929. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-six (36) pages, numbered from and including 1 to and including 36, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3d day of January, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2918)